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No. 04-66

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ABDELA TUM, *et al.*,

Petitioners,

v.

BARBER FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent, Barber Foods, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

1. This is a collective action pursuant to the provisions of section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), brought by a group of current and former employees of Barber Foods seeking compensation for alleged unrecorded and uncompensated work performed by them for the company. Partial summary judgment was granted in favor of Barber Foods, Pet. App. 20a-50a, and judgment was entered in favor of Barber Foods on the remaining claims after a jury trial. Plaintiffs appealed the judgment to the Court of Appeals for the First Circuit which, after rehearing, affirmed the judgment in all respects. *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004); Pet. App. 1a-19a.

Plaintiffs petitioned this Court for a writ of certiorari. Barber Foods did not respond to the petition, but did file a conditional cross-petition presenting a closely-related issue. *Barber Foods, Inc., dba Barber Foods v. Abdela Tum, et al.*, No. 04-231. This brief is now submitted in response to the order of the Court requesting Barber Foods to respond to the petition.

2. Barber Foods is a further processor of poultry-based products. It has no slaughtering, butchering, or deboning operations. It purchases boneless chicken breast in bulk and processes that raw material into finished products such as stuffed entrees, chicken fingers, and nuggets. The petitioners fall within four general job classifications: rotating associates who staff the production lines, set-up operators who tend the various machines on the line, meatroom associates who work where the raw product is blended with ingredients, and shipping and receiving associates. All associates are required to wear a lab coat, hairnet, earplugs, and safety glasses while

on the production floor. There are other items of clothing or equipment worn by some associates for comfort, sanitary, or safety reasons. Depending upon job classification, assignment, and personal preference, some combination of the following may be worn: vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belts, and safety boots.

Rotating associates are required to wear lab coats, hairnets, earplugs, and safety glasses. The lab coat, hairnet, and earplugs must be on before they can punch in and until they punch out. Safety glasses and any items that they choose but are not required to wear, such as gloves, aprons, and sleeve covers, can be donned after punching in and before punching out. Set-up operators must wear lab coats, hairnets, earplugs, safety glasses, safety boots, bump hats, and back belts. Any other items they choose to wear may be donned after punching in. Meatroom associates are required to wear lab coats, hairnets, earplugs, safety glasses, safety boots, back-belts, aprons and vinyl gloves. Many also choose to wear sleeve covers. The apron, gloves and sleeve covers can be donned after punching in and before punching out. Shipping and receiving associates are required to wear safety boots, hard hats and back-belts. They generally don these items before punching in and doff them after punching out. Their time clock is located on the production floor, so they must don and doff a lab coat, hairnet, and earplugs briefly to enter the production floor to punch in and out.

Lab coats and cotton glove liners are obtained by associates in the hallway between the entranceway and the equipment cage. The lab coats are on hangar racks and the glove liners are in tubs. Hairnets, earplugs, vinyl gloves, sleeve covers, and aprons are dispensed from the window of

the equipment cage. Vinyl gloves, sleeve covers, and aprons are also available from tubs on the production floor. Bump hats, back belts, safety glasses, safety boots, and reusable earplugs are dispensed once and then replaced as needed.

Lab coats and cotton glove liners are laundered and reused. Laundry bins are located along the hallway from the production floor exits to the plant exits and associates drop the coats and liners in these bins on their way out of the plant . Vinyl gloves, sleeve covers and aprons are disposable. Trash bins are located on the production floor and along the hallways from the production floor exits to the plant exits. These items may be removed and deposited in the trash bins on the production floor before punching out if the associate chooses. Bump hats, back belts, safety glasses, safety boots, and reusable earplugs are retained by associates and may be stored in their locker or taken home.

Associates are expected to be on the production floor ready to work when their shift begins. They are paid from the time they actually punch in to a computerized time-keeping system. Each associate has a swipe card. Time clocks are located at the entrances to the production floor. Rotating associates, set-up operators, and meatroom associates punch in at a clock in the area where they will be working and punch out on clocks which are located next to the two primary exits from the production floor. Shipping and receiving associates punch in and out on the plant office clock located on the production floor by the shipping and receiving office. Associates are paid from the moment they punch in. They are allowed twelve minutes of "swing time", meaning that they can punch in up to six minutes early and get paid from that time or up to six minutes late without incurring an attendance violation.

There is a great deal of flexibility and personal discretion among associates in when and where they don and doff their clothing and gear. Pre-shift, some associates arrive early, pick up their clothes, and then go to the cafeteria to socialize; some don their clothes before going to the cafeteria, some after; some go to the lockers and don their clothes there, others do not use lockers; some don their clothes as soon as they retrieve them, others don them right before entering the production floor, and others don them along the way. The only requirement is that they be on the line ready to go when the shift starts. Post-shift, associates doff their clothes at various points enroute to the exits. Some items may be thrown in the trash on the production floor before punching out. After punching out there are trash receptacles and laundry bins all along the hallway from the production floor exit to the plant exit. Some associates drop their items in the first available bin off the production floor while others use the last one before the plant exit.

3. Petitioners brought this collective action contending that they were entitled to compensation for the following activities: (1) donning and doffing of all clothing and equipment required by Barber Foods or government regulation as well as any optional gear "necessitated by working conditions"; (2) time spent walking to and from their work stations on the production floor after donning and before doffing such gear; and (3) time spent waiting to obtain any clothing and equipment from the equipment cage or other distribution station and time spent waiting to punch in at the time clocks after donning such clothing and equipment.

Barber Foods moved for summary judgment in its favor on all claims. In a recommended decision affirmed by the district court, the magistrate judge made two rulings central

to the present dispute. With respect to donning and doffing, the court concluded that "the donning and doffing of clothing and equipment required by the defendant or by government regulation, as opposed to clothing and equipment which employees choose to wear or use at their option, is an integral part of the plaintiffs' work for the defendant" and thus "are not excluded from compensation under the Portal-to-Portal Act as preliminary or postliminary activities." *Tum v. Barber Foods Inc.*, 2002 WL 89399, at *9, 10 (D. Me. 2002); Pet App. 36a-37a, 40a. With respect to walking and waiting time, the court ruled that Barber Foods

> is entitled to summary judgment on any claims based on time spent walking from the plant entrances to an employee's workstation, locker, time clock or site where clothing and equipment required to be worn on the job is to be obtained and any claims based on time spent waiting to punch in or out or for such clothing or equipment.

Id. at *8; Pet. App. 33a-34a.

A trial was held on the amount of time reasonably spent engaged in donning and doffing the required clothing and equipment in the relevant job categories and whether that time was *de minimis*. The jury found that the combined donning and doffing times ranged from one minute for rotating associates to two minutes sixteen seconds for set-up operators and determined that this time was *de minimis*. Petitioners appealed.

The First Circuit affirmed. 331 F.3d 1 (1st Cir. 2003). A petition for rehearing was granted, the original judgment was vacated, and a new opinion issued, again affirming the

district court in all respects. *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004); Pet. App. 1a-19a. The court of appeals agreed that the donning and doffing of required gear is an integral and indispensable part of the employees' principal activities and, in the absence of the jury's *de minimis* finding, would have been compensable , *Id.* at 279, Pet. App. 7a, but concluded that all of the other activities at issue in the case, including the donning and doffing of non-required gear, time spent waiting to obtain required clothing and gear and to punch in at time clocks after donning such gear, and time spent walking to and from the employees' work stations after donning and before doffing required gear, were preliminary and postliminary activities exempted from compensation by the Portal-to-Portal Act. *Id.* at 280-82; Pet App. 8a-12a.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

1. The first question presented by the petition is whether the time employees spend walking to and from stations where required clothing and equipment is distributed is compensable. Petitioners argue that the Court's intervention is necessary to resolve a conflict among the circuits on this issue. Although a conflict does exist at this time between the First and Tenth Circuits on the one hand and the Ninth Circuit on the other, Barber Foods submits that the First Circuit's decision on this issue was correct and, as the case law develops, its views are likely to become the clear majority rule, a situation which ordinarily would not warrant this Court's attention.

2. The second question presented by the petition is whether time employees spend waiting at stations where required clothing and equipment is distributed, and time spent donning and doffing optional equipment "necessitated by the employees' working conditions," is compensable. The First Circuit decided both questions in the negative. Its decision was correct. There is no conflict among the circuits regarding the noncompensability of donning and doffing optional clothing and gear, and the court's decision on the waiting time issue is likely to become the clear majority rule. Neither issue merits this Court's review.

3. The third question presented by the petition is whether walking and waiting time is rendered noncompensable because the associated donning and doffing time was determined to be *de minimis*. This issue was not addressed by the court of appeals and played no part in its decision. The Court should decline to grant certiorari on an issue that was not addressed in the court of appeals.

ARGUMENT

I. Scope And Coverage Of The Portal Act

The FLSA requires an employer to compensate employees for all of the time which the employer requires or permits employees to work. 29 U.S.C. § 201 *et seq.* Compensable "work" under the Act has been defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)

this Court, applying the *Tennessee Coal* definition of "work", held that employees were entitled to compensation for certain "preliminary" activities performed after arriving at the workplace but before beginning their principal work activities, including "putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for production work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools." *Id.* at 692-93. The Portal Act was enacted in response to the *Mt. Clemens* decision. Under the Portal Act, employers are not obligated to compensate employees for "walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" or for "activities which are preliminary or postliminary to said principal activity or activities" where such traveling or activities "occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). However, activities performed either before or after the regular work shift are compensable "if those activities are an integral and indispensable part of the [employees'] principal activities . . . and are not specifically excluded by Section 4(a)(1)." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

II. The Court Of Appeals Correctly Determined That The Time Employees Spend Walking To And From The Production Floor After Donning Required Clothing And Equipment And Before Doffing That Gear Is Noncompensable Preliminary And Postliminary Activity Under The Portal Act.

1. The Petitioners contend that the court of appeals erred in holding that the time employees spend walking to and from the production floor after donning and before doffing required clothing and equipment is noncompensable preliminary and postliminary activity under the Portal Act. They argue that this walking time is compensable for two basic reasons. First, it occurs during the "workday" which, according to the Petitioners, runs continuously between the first and last compensable activities of the day and thus is not subject to the limitations of the Portal Act. Second, the walking time is in any event integral and indispensable to the employees' principal job activities. Pet. 14.

2. The Petitioners' "workday" argument is as follows: The Portal Act exempts from compensable work only those preliminary and postliminary activities "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). Any walking time which occurs after the commencement of the employees' first principal activity is compensable work because it is part of the "workday" and not exempted from compensation by section 4(a). 29 C.F.R. § 790.6(a), (b). Principal activities include all activities which are integral and indispensable to those activities. *Id.* § 790.8(b), (c). The court of appeals held that the donning and doffing of required clothing and equipment is an integral part of

the employees' principal activities. Pet. App. 7a. Therefore, Petitioners argue, walking to and from their work stations after donning and before doffing is compensable because it occurs between the commencement and completion of the principal activities of donning and doffing required gear.

There is some support in the interpretive regulations for the Petitioners' expansive view of the parameters of the "workday." *See* 29 C.F.R. §§ 790.6(a), (b), 790.8(b), (c). Petitioners argue that this Court should defer to the Secretary of Labor's views as expressed in these regulations. However, as the court of appeals pointed out, Pet. App. 10a, those regulations cut both ways. The regulations clearly contemplate that walking by an employee between the plant entrance and the employee's workstation, where he actually performs the work he was hired to do, would normally be considered noncompensable preliminary and postliminary activity. 29 C.F.R. § 790.7(e), (f)(1). Petitioners argue that this is not so where donning and doffing is considered an integral part of the employees' principal activities, but the regulations also clearly contemplate that walking to and from "the actual place of performance of the specific work the employee is employed to perform" may be considered preliminary and postliminary activity even if it occurs between compensable donning and doffing, *id.* § 790.7(g) n.49, or even if the employee is carrying "ordinary hand tools" required for the job. *Id.* § 790.7(d). The regulations relied upon by Petitioners refer in general terms to "principal" activities and "integral" and "indispensable" activities. Those cited by Barber Foods deal specifically with the issue of walking time. On balance, the interpretive regulations favor the conclusion that walking to and from the plant entrance to the employees' work stations where they perform the specific work they were hired to perform is noncompensable preliminary and postliminary activity even if it occurs between compensable donning and doffing.

This position makes sense and avoids absurd results. Normally, walking from the plant entrance to the actual work station is noncompensable. *Id.* § 790.7(e), (f)(1). That path must be traversed in any event. It is difficult to discern why that noncompensable walk should become compensable simply because the employee has first donned some required clothing or equipment. According to the Petitioners, the first and last compensable activities, even if *de minimis*, form the boundaries of the "workday" within which the Portal Act does not apply. Under this view, an employee who is required to wear only a hardhat and who dons that hardhat at the plant entrance must be paid for his walk to his workstation while another employee who works right beside him but is not required to wear a hardhat need not be paid for that same walk. Post-shift, Barber Foods' employees doff their clothing and equipment at various points enroute from the production floor to the plant exit. Some items can be thrown in the trash can in the production area before punching out. After punching out, there are laundry bins and trash receptacles all along the hallway from the production floor exit to the plant exit. Some employees drop their items in the first bin right outside the production floor while others use the last bin before the plant exit. Under the Petitioners' reading of the regulations, the employee who doffs her equipment and drops it in the first bin ends her compensable workday at that point while the employee who walks by her and drops her clothes in the last bin gets paid for the walk. Such distinctions make no sense and, as the First Circuit recognized, the position advanced by the Petitioners "threatens to undermine Congress's purpose in the Portal-to-Portal Act, which (with rare exceptions) sought to exclude preliminary and postliminary waiting and walking time from compensability." Pet. App. 10a.

3. Petitioners also claim that the walking time "is in any event compensable because it, like the time spent donning and doffing required equipment, is integral and indispensable to the

employees' principal job activities." Pet. 14. The standard applied by the Petitioners in arriving at this conclusion, that to be "integral and indispensable" an activity must be necessary to the principal work performed and done for the benefit of the employer, Pet. 20, conflates the test for determining whether an activity is an integral and indispensable part of the employees' principal activities with the test for determining whether an activity constitutes "work" and renders the Portal Act superfluous. The court of appeals correctly rejected Petitioners' argument in this regard.

The concepts of "work" and noncompensable preliminary or postliminary activities are not mutually exclusive. In other words, the fact that an activity may constitute "work" under the *Tennessee Coal* definition does not mean that the activity must either be a principal activity or integral to a principal activity. Even if an activity constitutes "work" it may still be a noncompensable preliminary or postliminary activity because the very purpose of section 4(a) of the Act was to relieve employers from the obligation to compensate employees for certain preliminary and postliminary activities that would otherwise be compensable and the only reason they would otherwise be compensable is if they constituted "work." *See* 29 C.F.R. § 790.4(a)(1):

> The primary Congressional objectives in enacting section 4 [were] to minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the [FLSA] of such preliminary or postliminary activities should continue to be tested solely by existing criteria for determining compensable worktime.

Id. § 790.2(a) (The Act "contemplates that employers will be relieved, in certain circumstances, from liabilities . . . to

which they might otherwise be subject under the [FLSA]"); *Id.* § 790.4(a) (Section 4 "relieves the employer from certain liabilities . . . to which he might otherwise be subject under the provisions of the [FLSA])." Thus, even if the walking time can be considered "work", it may still be preliminary and postliminary activity.

It follows that the fact that certain activities are necessary to the principal work performed and done for the benefit of the employer does not automatically transform those activities from noncompensable preliminary and postliminary activities to compensable integral and indispensable activities. The very nature of preliminary activities is that they are a prerequisite to the performance of the principal activities and are obviously of benefit to the employer. To say, as the Petitioners do, that any activity which is necessary to the principal work performed and done for the benefit of the employer, which is the *Tennessee Coal* definition of "work," cannot be a preliminary or postliminary activity but must necessarily be deemed an integral and indispensable part of the principal activity, is in effect to transpose the criteria for determining "work" onto the criteria for determining preliminary and postliminary activity even though the purpose of section 4 was to exclude such activity from the "existing criteria for determining compensable worktime." *Id.* § 790.4(a)(1). It would also ensure that every activity which qualifies as "work" must also be considered integral and indispensable to the principal activity, leaving the preliminary/postliminary category to cover only those activities which do not qualify as "work." Congress did not need to enact the Portal Act to accomplish that result, because if the activity was not "work" it was not compensable under the FLSA in any event. The Petitioners' argument, which would render the Portal Act superfluous, should be rejected.

III. The Court Of Appeals Correctly Determined That The Time Employees Spend Waiting At Stations Where Required Clothing And Equipment Is Distributed, And Time Spent Donning And Doffing Optional Equipment, Is Noncompensable Preliminary And Postliminary Activity Under The Portal Act.

A. Waiting Time

The court of appeals concluded that "a short amount of time spent waiting in line for gear is the type of activity that the Portal-to-Portal Act excludes from compensation as preliminary." Pet App. 12a. This holding was correct. The interpretive regulations clearly contemplate that a reasonable amount of waiting time was intended to be noncompensable preliminary activity. Examples include "checking in and out and waiting in line to do so" and "waiting in line to receive pay checks." 29 C.F.R. § 790.7(g). One regulation specifically states that "checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities." *Id.* § 790.8(c).

There is no logical analytical distinction between waiting in line to check in and punch a time clock and waiting in line to obtain required clothing and equipment. Both are necessary before performing the principal work activity and are done for the benefit of the employer. In Petitioners' view, this is enough to make them both integral and indispensable to the principal activity. Yet, the regulations provide that waiting in line to check in should normally be considered preliminary activity. Consistent with the intent of the interpretive regulations and the underlying purposes of the Portal Act, there is no reason to treat waiting in line to obtain required clothing and equipment any differently.

Except for the smallest of employers, it is impossible for all employees to arrive at the place of employment, punch a time clock, and be at their workstations ready to work at exactly the same time, without varying degrees of waiting time. Depending upon when they arrive at the plant, some may have to wait at the time clock and others may not. The situation is similar in this case with regard to obtaining required clothing and equipment. Some employees arrive early, pick up their clothes, and then go to the cafeteria to socialize; some don their clothes before going to the cafeteria, some after; some go to the lockers and don their clothes there, others do not use lockers; some don their clothes as soon as they retrieve them, others done them right before entering the production floor, and others don them along the way. Some arrive at the plant early and some arrive at the last possible minute. The only requirement is that they be on the line ready to go when the shift starts, and even as to that requirement they are allowed up to twelve minutes of "swing time", meaning they can punch in up to six minutes early and get paid for that time or up to six minutes late without incurring an attendance violation. Depending on when they arrive at the plant, some may have to wait in line to obtain their gear while others do not have to wait at all. As this Court stated in *Mt. Clemens*, in rejecting a claim for time spent waiting in line to punch a time clock, "[it] would be manifestly unfair to credit the first person with . . . more working time than credited to the last person due to the fortuitous circumstance of his position in line." 328 U.S. 680, 690. That is why a reasonable amount of pre-shift waiting time is considered noncompensable preliminary activity.

B. Donning and doffing of optional clothing and equipment

The court of appeals held that the donning and doffing of required gear is an integral and indispensable part of the employees' principal activities and therefore compensable. Pet. App. 7a. That ruling, with which Barber Foods disagrees, is the subject of its conditional cross-petition. The court also held that the donning and doffing of optional clothing and equipment is noncompensable preliminary and postliminary activity. Pet. App. 8a. This ruling was clearly correct and there is no conflict among the circuits on the topic which would warrant this Court's review.

The noncompensability of clothes changing is the rule, not the exception. *Steiner v. Mitchell*, 350 U.S. 247, 249 (1956); 29 C.F.R. § 790.7(g) ("Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities, include . . . changing clothes . . ."). "Changing clothes" encompasses the donning and doffing of sanitary and protective clothing and equipment. *See*, June 6, 2002 Opinion Letter, Department of Labor Wage and Hour Division, 2002 WL 32406592.

With the exception of the First Circuit in this case, every other court of appeals which has addressed the issue has held that the donning and doffing of *required* clothing the same or similar to that involved in this case is noncompensable. *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) (smocks, hairnets, earplugs, safety glasses, hard hats, safety boots); *Alvarez v. IBP, Inc.* 339 F.3d 894 (9th Cir. 2003) (frocks, hairnets, earplugs, safety glasses, hard hats, safety boots); *Anderson v. Pilgrim's Pride Corp.*, 44 Fed. Appx. 652 (5th Cir. 2002), *aff'g*, 147 F. Supp. 2d 556 (E.D. Tex. 2001)

(smocks, hairnets, earplugs, safety glasses, gloves, boots, sleeve covers). None of these courts have held, nor, given the reasoning behind their decisions, would hold that the donning and doffing of *optional* clothing is compensable.

The Petitioners assert that the court of appeals' ruling that the donning and doffing of optional equipment is noncompensable "flatly contradicts" *Steiner*, Pet. 10, which Petitioners contend "stands for the proposition that time spent donning and doffing safety equipment is compensable if it is integral and indispensable to the employees' jobs, a determination that does not turn on whether it is a formal job requirement." Pet. 23. Although this characterization of the *Steiner* holding is correct as far as it goes, it fails to recognize the limited scope of the *Steiner* decision. As noted earlier, the noncompensability of clothes changing is the rule, not the exception. 29 C.F.R. § 790.7(g). In *Steiner*, this Court recognized a limited and narrow exception to the general rule. Emphasizing that "changing clothes . . . under normal conditions . . . ordinarily constitutes 'preliminary' or 'postliminary' activities excluded from compensable work time as contemplated in the Act," 350 U.S. at 249, the Court held that where employees were exposed to and made "extensive use of dangerously caustic and toxic materials, and [were] compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law require[d] their employer to provide," such clothes changing was an integral and indispensable part of the employees' compensable principal activities. *Id.* at 248, 256. Thus, *Steiner* recognized that, despite the general rule of noncompensability, clothes changing may be regarded as an integral and indispensable part of employees' principal activities if it involves special protective gear that is uniquely and closely related to dangers

inherent in a particular job and is compelled by vital considerations of health and hygiene. That is not the situation with respect to the optional clothing and gear at issue in this case.

The Petitioners argue that the scope of the *Steiner* decision is not so limited and that any activity, including donning and doffing, is integral and indispensable if it is necessary to the principal work performed and done for the benefit of the employer. As discussed earlier, this is not the correct standard because it conflates the test for determining whether an activity is an integral and indispensable part of the employees' principal activities with the test for determining whether an activity constitutes "work" even though an express purpose of the Portal Act was to exempt as preliminary and postliminary some activities that previously would have been considered to be compensable work. Even if it was the correct standard, it is not met by the optional clothing and equipment involved in this case. The items in question are neither required nor necessary in order to perform the employees' principal job activities. They are worn as a matter of discretion for personal comfort and convenience. The fact that many employees choose not to wear these optional items demonstrates that they are not necessary. To be sure, most anything that contributes to the comfort and convenience of employees is of at least indirect benefit to the employer, but the primary benefit is for the employee. Barber Foods submits that the donning and doffing of these optional items would not qualify as work even under the *Tennessee Coal* definition. It certainly does not qualify as integral and indispensable to the principal job activities under the Portal Act, which was intended to impose limitations on the scope of compensable work in this area.

Petitioners' reading of *Steiner* to encompass the donning and doffing of the optional items at issue in this case would extend the limited exception recognized by that case far beyond its intended scope. It would turn the noncompensability of clothes changing into the rare exception, rather than the general rule.

IV. The Issue Of Whether Walking And Waiting Time Is Rendered Noncompensable Because The Associated Donning And Doffing Time Was Determined To Be *De Minimis* Was Not Addressed By The Court Of Appeals And Played No Part In Its Decision.

The third question presented by the petition is whether walking and waiting time is rendered noncompensable because the associated donning and doffing time was determined to be *de minimis*. This issue was not addressed by the court of appeals and played no part in its decision that the walking and waiting time in this case is noncompensable preliminary and postliminary activity. The Court should decline to grant certiorari on an issue that was not even addressed by the court of appeals.

The jury's determination that the time spent donning and doffing required clothing and equipment was *de minimis* was not a factor in the court of appeals' decision. The court first ruled that the donning and doffing of required gear is compensable because it is an integral and indispensable part of the employees' principal activities. Pet. App. 7a. Then, assuming that the donning and doffing is compensable and without once mentioning the *de minimis* finding, the court held that the walking and waiting time associated with that activity is, nevertheless, noncompensable preliminary and postliminary activity. Pet. App. 8a-12a. The question urged

by Petitioners would be presented if the court had ruled that the walking and waiting time associated with required donning and doffing would ordinarily be compensable but, given the jury's *de minimis* finding, it cannot be so in this case. However, that was not the basis of the court of appeals' ruling. Instead, the court assumed that the donning and doffing activity was compensable and held that the associated walking and waiting time was noncompensable anyway. The *de minimis* finding simply played no role in its decision.

Petitioners assert that this case presents the opportunity for the Court "to resolve an important circuit split regarding the application of the *de minimis* rule," Pet. 10, and to "provide guidance to the courts of appeals as to how the period of time that is the subject of the *de minimis* inquiry should be defined . . . ," Pet. 9, and the petition discusses this issue extensively. Pet. 7-10, 12-13, 17-18. This is an interesting issue. However, it is not an issue that was decided, or even discussed, by the court of appeals and it is not one of the three questions that Petitioners identified as being presented by the petition. The Court should decline to provide an advisory opinion on the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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